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Supreme Court of the United States

October Term, 1962
No. 818

UNIVERSAL FILM EXCHANGES, INC.
ALLIED ARTISTS DISTRIBUTING CORP.
RKO GENERAL, INC.
PARAMOUNT FILM DISTRIBUTING CORP.
TWENTIETH CENTURY-FOX FILM CORP.
UNITED ARTISTS CORPORATION
COLUMBIA PICTURES CORP.
LOEW'S, INCORPORATED,
Petitioners

v.

BOARD OF FINANCE AND REVENUE

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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JURISDICTION

The jurisdiction of the Board of Finance and Revenue on refund petitions is "final". The action of the Board was reviewed by the Supreme Court of Pennsylvania on narrow certiorari. Review by this Court, if permitted, should also be limited to narrow certiorari.

QUESTION PRESENTED

Where the State Constitution permits only the Legislature to modify the State's sovereign immunity from suit, and where the Legislature, in authorizing refunds of taxes or license fees by the Board designated for this purpose, imposes a five-year limitation upon such refunds, is the five-year limitation constitutional?

STATEMENT OF THE CASE

The petitioners here are in effect attempting to sue the Commonwealth of Pennsylvania for $4,637,258.14 "and upwards" for license fees allegedly paid by petitioners to the State Board of Motion Picture Censors during the 39-year period from 1915 to 1953, inclusive. These petitioners had already received refunds of $337,436.25 for license fees paid during the 5-year period prior to 1958.

The petitioners filed petitions for refund before the Pennsylvania Board of Finance and Revenue, which refused the petitions because, inter alia, the refunds were claimed for payments made beyond the 5-year statutory period of limitations. Since the action of the Board of Finance and Revenue was "final", there was no statutory provision for appeal or writ of error. However, the Pennsylvania Supreme Court assumed jurisdiction to review these petitions by narrow certiorari because the appellants had raised a constitutional question, i.e., that the 5-year statute of limitations violated due process.

The Pennsylvania Supreme Court, in upholding the orders of the Board of Finance and Revenue, decided that the payments had not been paid under compulsion or duress, and that the 5-year period of limitations was valid.

Article I, Section 11 of the Pennsylvania Constitution provides that "suits may be brought against the

Commonwealth in such manner, in such courts, and in such cases as the Legislature may by law direct". The Pennsylvania Supreme Court has held that "An action against the Board of Finance and Revenue is an action against the State": *Land Holding Corp. v. Board of Finance and Revenue*, 388 Pa. 61, 65, 130 A. 2d 700 (1957).

The refund provisions of The Fiscal Code required that petitions for refund of taxes or license fees paid under a statute later held to be unconstitutional must be filed within 5 years of payment thereof. This provision has been construed as "not merely procedural", but "express conditions of the right to obtain a refund": *Box Office Pictures, Inc. v. Board of Finance and Revenue*, 402 Pa. 511, 516, 518, 166 A. 2d 656 (1961), in which the appellants were also contending that similar license fees had been paid under compulsion or duress, and for that reason the 5-year limitation, being in violation of due process, would not apply.

The petitions for certiorari should be denied by this Court because: (1) the license fees in question were not paid under duress or compulsion, and the 5-year limitation is valid; (2) even if the license fees had been paid under duress or compulsion, the petitioners could not have recovered them because of (a) the six-year common law limitation pronounced by the court below, (b) the laches and delay of the petitioners, and (c) the unavailability of the Board of Finance and Revenue, with its jurisdiction limited to claims filed within 5 years of payment, to hear any petitions such as the instant ones beyond its statutory powers.

The payment of license fees by the petitioners during the period from 1915 to 1953 were not made under duress or compulsion, either in fact or in law. During that period, the censorship statute was deemed to be constitutional, because it had been in effect so held both by this Court and by the Supreme Court of Pennsylvania. For purposes of determining duress, the statute must have been constitutional during that period; otherwise, the alleged duress would necessarily have to be attributed solely to the earlier decision of this Court.

Moreover, during the entire 39-year period, petitioners made no protests as to payments, and took no procedural steps or remedies to have their rights adjudicated. In filing the initial petitions for refunds, petitioners waited more than six years after the decision of this Court reversing its former position, and 2½ years after the similar decision of the Supreme Court of Pennsylvania. The petitions said nothing about duress and compulsion, and not until 4 months after the decision of the Pennsylvania Supreme Court in the *Box Office Pictures* case were the Amended Second Amended Petitions filed alleging duress. This was more than 9 years after the decision of this Court holding such a statute unconstitutional. Nowhere except in the petitioners' brief can we find this doctrine of nunc pro tunc duress or hindsight compulsion.

In the allegations of duress and compulsion in the Amended Second Amended Petitions, no facts are averred—only legal hypotheses and conclusions. Nowhere do the appellants allege any instance of threats

or pressure against them by the enforcement officials. Consequently there is no factual or legal duress or compulsion presented at any point in these appeals.

The petitioners rely strongly upon language in the Opinion of the Pennsylvania Supreme Court in the instant case that where taxes or other monies are paid under duress or compulsion, no statutory authority is required to enable the payors to recover the amounts paid. However, this is dictum, and was not necessary to the decision of this case, since the Court had held that the license fees were not paid under duress and compulsion. Further, if the petitioners intend to rely upon this dictum, they must also include the further statement of the Court that even when taxes are paid under duress and compulsion, the taxpayer "could not have recovered them beyond six years after payment". This sustains the validity of a limitation upon the period for which the payor may recover under any circumstances.

The *Box Office Pictures* decision clearly held that the 5-year limitation was a basic condition to the power and authority of the Board of Finance and Revenue to grant refunds. That decision has not been overruled or modified. Assuming arguendo that the petitioners would have some sort of unspecified remedy for the recovery of license fees paid within six years prior to the institution of the suit, such a remedy would not be available before the Board of Finance and Revenue for license fees paid beyond the 5-year period.

ARGUMENT

I. Payments of Petitioners' License Fees Were Not Made Under Duress or Compulsion

The Supreme Court of Pennsylvania has ruled that the petitioners did not pay the license fees in question under legal duress, and discussed in support of this ruling the decisions of this Court in *Gaar, Scott & Co. v. Shannon*, 223 U.S. 468, 471 (1921), and *Chesebrough v. United States*, 192 U.S. 253, 259 (1904). The former case dealt with the absence of a remedy, and the latter case with the necessity of a protest.

The Supreme Court of Pennsylvania further held that there was no violation of due process, because the petitioners "could have paid the fees under protest and with notice of an intent to reclaim and recover the amounts paid, and brought a timely suit in assumpsit or under certain circumstances a bill in equity to restrain the collection of the tax", and then enumerated other remedies available to the petitioners. The Court pointed out that "the fees in question were paid without protest as a quid pro quo for the inspection services rendered by the censorship board", quoting from its prior decision in *Box Office Pictures, Inc. v. Board of Finance and Revenue*, supra (402 Pa. 511, 518, 519, 166 A. 2d 656).

(a) Petitioners Made No Protests When the License Fees Were Paid

There could have been no duress or compulsion exerted against petitioners when the license fees were paid, because during the entire 39-year period, the petitioners made no protests as to payments and took none of the available procedural steps or remedies to have their rights adjudicated.

At common law, protest at the time of payment was a condition precedent to the recovery back of a tax which had been illegally exacted: *George Moore Ice Cream Co., Inc. v. Rose*, 289 U.S. 373, 375 (1933).

Persons failing to avail themselves for an opportunity to object and be heard, cannot thereafter complain of assessments as arbitrary and unconstitutional: *Farncomb v. Denver*, 252 U.S. 7 (1920); see also *Pullman Co. v. Knott*, 235 U.S. 23 (1914).

Payment under protest was an essential ingredient for the payments under duress in the decisions of this Court cited on page 9 of the Petition for Certiorari.

In *Union Pacific RR Co. v. Public Service Commission*, 248 U.S. 67 (1918), cited four times by the petitioners and relied upon heavily by them, the protest against the payment was immediate and unequivocal. The Union Pacific Railroad left no doubt that the payment was being made under protest, and instituted the necessary proceedings to have the validity of the assessment litigated. This protest was basic to the railroad's position, and enabled this Court to rule that the payment of the assessment was not

voluntary, and therefore could subsequently be recovered from the Public Service Commission.

The payments have also been made under protest in *Atchison, T. & S. F. Ruy. Co. v. O'Connor*, 223 U.S. 280 (1912); *Gaar, Scott & Co. v. Shannon*, supra (223 U.S. 468) and *Robertson v. Frank Bros. Co.*, 132 U.S. 17 (1889), cited by petitioners.

In *Stahmann v. Vidal*, 305 U.S. 61, 64 (1938), also cited by petitioners, this Court expressly stated that under the statute there involved it was "unnecessary to plead or prove that the tax was paid under protest or its collection was accompanied by duress".

There are many cases which recognize that the payment of a tax or license fee, without protest, to prevent the closing of, or interference with, a business was a voluntary payment; see *Mays v. Cincinnati*, 1 Ohio St. 268 (1853); *Charlottesville v. Marks' Shows, Inc.*, 179 Va. 321, 18 S.E. 2d 890 (1942); *Houston v. Feizer*, 76 Tex. 365, 13 S.W. 266 (1890); and *United States v. New York C. Mail S.S. Co.*, 200 U.S. 488, 494 (1906), where this Court did not permit the recovery of amounts paid for stamps allegedly purchased under duress.

In *Swift Co. v. United States*, 111 U.S. 22 (1884), also cited by petitioners, the Government was seeking to defeat the recovery for revenue stamps on the basis that the payments made in conformity with the Governmental requirement precluded their recovery; but this Court limited such recovery to payments made within the six-year statute of limitations. That case amply demonstrated that the voluntary or involuntary

nature of the payments does not affect the applicability of a statute of limitations.

(b) Petitioners Did Not Seek Available Remedies

The petitioners had the right to an appeal from the decision of the Board of Censors to the Court of Common Pleas of the proper county under Section 26 of the Act of May 15, 1915, P.L. 53, 4 P.S. §54. This was the very procedure used in determining that the Act of 1915 was unconstitutional in *Hallmark Productions, Inc. v. Carroll*, 384 Pa. 348, 121 A. 2d 584 (1956).

At the same time, the petitioners had the right within two years of payment to file petitions for refund under Section 503 of The Fiscal Code, 72 P.S. §503. There was no prerequisite for any litigation, past, present or future, as a basis for such petitions. Although the action of the Board of Finance and Revenue on such petitions would have been "final" under the statute, nevertheless, the petitioners could have secured review on narrow certiorari by the Supreme Court of Pennsylvania, as was done in the instant case.

The petitioners would also have the right to appeal from any summary proceedings instituted against them under the Act of 1915 if the magistrate would have assessed the fine of $25.00 to $50.00 imposable under the Act.

If we assume that the petitioners did not have adequate remedies under these statutes, they would have been entitled to relief in equity. This was the method

used to determine the constitutionality of the Act of 1911 (the predecessor of the Act of 1915) in *Buffalo Branch, Mutual Film Corp. v. Breitinger*, 250 Pa. 225, 95 Atl. 433 (1915).

The petitioners as domiciliaries of other states may have also had the power in the Federal Courts to restrain the enforcement of the Censorship Law by the State Board; see *Mutual Film Co. v. Industrial Commission of Ohio*, 236 U.S. 230 (1915), aff'g. 215 Fed. 138.

Consequently, petitioners cannot successfully contend that the license fees were paid under duress or compulsion, when they failed to take timely advantage of the adequate remedies at law or in equity available to them.

(c) Petitioners Are Estopped by Laches

The inaction of the petitioners constituted a waiver of their constitutional rights, and estopped them from successfully prosecuting the present cases. In *Wilson v. School District of Philadelphia*, 328 Pa. 224, 195 Atl. 90 (1937), the Court applied as to delinquent taxpayers "the equitable doctrine of estoppel * * * in the realm of constitutional law", and stated:

> "* * * Once a taxpayer has omitted to voice his objection within a reasonable time after the levy has been made and with knowledge that his claim will be made the basis of expenditures to be incurred, and the expenditures have been made, it is too late for him to attempt to impeach the validity of the tax levy. Under such circum-

> stances *he must be deemed to have waived all right to assert any constitutional objection which might have afforded him protection had he chosen to invoke it at the proper time.* * * *"*

In *Burstyn, Inc. v. Wilson*, 343 U.S. 495 (May 26, 1952), this Court reexamined the validity of motion picture censorship statutes, and found them to be unconstitutional. The petitioners took no steps at that time to protect any rights which may have accrued. The Supreme Court of Pennsylvania, on the authority of the decision of this Court in the *Burstyn* case, held that the Pennsylvania Motion Picture Censorship Act was unconstitutional in *Hallmark Productions, Inc. v. Carroll*, 384 Pa. 348, 121 A. 2d 584 (March 13, 1956). Again petitioners did not take any steps to obtain any refunds which might have accrued at that time.

The chronological sequence of facts is set forth in the Appendix to each of the Motions to Quash filed in the court below. As an example, this brief (p. 24) includes a copy of the Appendix of the Motion to Quash in the *Universal Film Exchanges, Inc.*, appeal, the first of the eight cases to be docketed. The appendices in all other cases are identical, except for normal variations in dates and amounts.

In the *Universal Film Exchanges* case, the initial Petition for Refund (2a) was filed with the Board of Finance and Revenue October 8, 1958, more than two and one-half years after the decision in the *Hallmark* case. That petition did not specify the amount of refund claimed, or the period of time involved. Two months later (December 5, 1958), the first Amended

Petition for Refund (5a) was filed, wherein a time period (October 8, 1953 to March, 1956) and a sum certain ($49,108.91) were specified. Two months later (February 6, 1959) an Amended Schedule (7a) to the First Amended Petition was filed, increasing the amount of the claim ($49,844).

On July 2, 1959, the Board of Finance and Revenue granted a refund to Universal Film Exchanges, Inc. (10a), in the amount claimed in Amended Schedule (i.e., $49,844). Three months later (October 8, 1959), the Second Amended Petition (11a) was filed, making a claim for refund for the period of May 15, 1915 to October 7, 1953 in the amount of $723,849.50 "and upwards". Fifteen months later (January 4, 1961), the Court decided the similar case of *Box Office Pictures v. Board of Finance and Revenue*, supra (402 Pa. 511, 166 A. 2d 656), wherein the question of duress and compulsion in the payment of motion picture censor license fees was discussed. Four and one-half months thereafter (May 25, 1961), the Amended Second Amended Petition (16a), was filed, in which the petitioners averred *for the first time* that the license fees were paid "under duress and compulsion". This was nine years after this Court decided the *Burstyn* case.

All of the present petitioners participated in the *Box Office Pictures* case as amicus curiae and were represented by counsel, who presented oral argument and briefs at both the original argument and reargument in the Supreme Court of Pennsylvania. The same counsel presented oral argument and briefs before that court in the present case.

These omissions and delays do not describe the reaction of parties who have been coerced into paying

unconstitutional fees. Duress would occur, if at all, when the payments were made and not as an afterthought conceived as many as 46 years later. Year after year, the Commonwealth was paying out to the employees of the Board of Censors the receipts from the license fees which the petitioners now seek to recover. This is sufficient change in position to justify the averment of laches, and demonstrates petitioners' delay in inventing their concept of duress—the hindsight variety.

Moreover, petitioners' petitions were defective for failing to plead facts, as distinguished from hypotheses and conclusions, relating to specific times and dates, places and amounts. Even the total amounts claimed were qualified by the words "and upwards". These pleadings were so vague and indefinite that neither the Board nor the Court, even if convinced that the license fees were refundable as having been paid under duress, could have made an order granting such refunds in any precise amount.

(d) The Censorship Statute Was Constitutional When the License Fees Were Paid

For the purpose of determining whether the censorship license fees were paid under duress and compulsion, the Act of 1915 imposing such fees must be deemed to have been constitutional between 1915 and 1953, the period when petitioners paid the license fees for which refunds are now being sought.

The constitutionality of motion picture censorship was upheld in *Buffalo Branch, Mutual Film Corp. v.*

Breitinger, supra (250 Pa. 225, 95 A. 2d 433), based on principles previously enunciated in *Mutual Film Corp. v. Industrial Commission*, supra (236 U.S. 230) by this Court. The constitutionality of censorship was never questioned in the Pennsylvania appellate courts until the *Hallmark* decision in 1956. See statement on this point in the *Box Office Pictures* case, supra (402 Pa. 511, 517, 518, 166 A. 2d 656, 660).

This means that the motion picture censorship act was constitutional between 1915 and 1956, not because of the presumption of constitutionality, but because of a positive ruling to that effect by the appellate courts. Under these circumstances, the rule of retroactive unconstitutionality should not apply, because it would be impossible to determine at what point of time the constitutional statute became unconstitutional.

It is well established that in the rare instances where courts depart from the doctrine of stare decisis and overrule previous decisions affecting rules of property and vested rights, such change of position is limited prospectively: *Douglas v. County of Pike*, 101 U.S. 677 (1879); *Taylor v. Ypsilanti*, 105 U.S. 60, 71 (1881); *Olcott v. Supervisors of Fond Du Lac Co.*, 16 Wall 678, 21 L. Ed 382 (1873); *Duhame v. State Tax Commission*, 55 Ariz. 268, 179 P. 2d 252 (1947); *Button v. Drake*, 302 Ky. 517, 195 S.W. 2d 66 (1946); 14 *Am. Jur.* 346, "Courts", §130.

Under this doctrine, the inspections by the motion picture censors and the licenses paid thereunder were completed under the Act of 1915 at a time when it was constitutional.

Even if this doctrine of prospective modification of stare decisis were not applicable to the present case, the doctrine of retroactive unconstitutionality should not apply to transactions consummated prior to the decision holding the statute invalid.

In *Chicot Co. Drainage District v. Baxter State Bank*, 308 U.S. 371, 374 (1940), after expressly distinguishing the cases relied upon by petitioners (*Norton v. Shelby Co.*, 118 U.S. 425, 442; *Chicago, I. & L. Ry. Co. v. Hackett*, 228 U.S. 559, 566), this Court stated:

> "* * * The actual existence of a statute, prior to such a determination, [i.e., unconstitutionality] is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects. * * * Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified."

This was quoted with approval by the Supreme Court of Pennsylvania in the *Box Office Pictures* case, supra.

Petitioners excuse their failure to make any protest or to take advantage of the various remedies available on the grounds that "it would not have been possible to obtain a court decision holding the 1915 Censorship Act unconstitutional until, at the very earliest, sometime after 1952" when the *Burstyn* case was decided by this Court; and that any action brought during this period would have been "futile" and "summarily dismissed" (Petition for Certiorari, p. 12). This sense of futility was apparently not shared by the parties who successfully prosecuted the litigation before this Court in the *Burstyn* case and before the Pennsylvania Supreme Court in the *Hallmark* case.

The petitioners' logic can result in only one conclusion—that the "duress or compulsion" averred for the period from 1915 to 1953 arose out the 1915 decisions of this Court and of the Supreme Court of Pennsylvania upholding the constitutionality of censorship of motion pictures. In other words, petitioners are saying that they paid the license fees under "duress", because they believed that the law, as interpreted by our highest Courts, constitutionally required them to do so; this is why they did not seek any of the available remedies. Petitioners have thus added another ingredient to the availability of a remedy, i.e., an absolute guarantee that they would have prevailed. Such a doctrine of duress cannot be supported either by precedent, logic, or common sense.

In the absence of protest or resort to judicial review, the payments of taxes or license fees in the belief that the law imposing them was valid, whereas it was afterwards declared unconstitutional, were pay-

ments made under a mistake of law and therefore not recoverable: 51 *Am. Jur.* 1024, 1025, "Taxation", §1193. This has been the law of Pennsylvania: *Royal McBee Corp. Tax Case*, 393 Pa. 477, 480, 143 A. 2d 393 (1958); *Philadelphia & Reading C. & I. Co. v. Tamaqua Borough School District*, 304 Pa. 489, 494, 156 Atl. 75 (1931); *Taylor v. Board of Health*, 31 Pa. 73, 75 (1855); *Box Office Pictures, Inc. v. Board of Finance and Revenue*, supra (402 Pa. 511, 518, 166 A. 2d 656, 659); *H. J. Heinz Co. v. School District of Pittsburgh*, 170 Pa. Superior Ct. 441, 445, 87 A. 2d 85 (1952); *Schoenfeld v. City of Bradford*, 16 Pa. Superior Ct. 165, 170 (1901).

II. The Five-Year Statutory Limitation Was Valid and the Board of Finance and Revenue Had No Jurisdiction To Grant These Refunds

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The Board of Finance and Revenue had no jurisdiction to grant refunds for license fees paid more than five years prior to the dates of filing the respective petitions for refund. Article I, Section 11 of the Constitution of Pennsylvania places in the Legislature the plenary power to provide under what conditions money previously paid may be refunded. Ordinarily, refunds may be claimed only for licenses or taxes paid within two years of the date of the petition; but where the statute imposing such license or tax has been judicially declared to be unconstitutional, the Legislature has enlarged the time limit to five years. These respective time limits are conditions precedent to relief, and are an inextricable part of the basic jurisdic-

tion of the Board. Since the Board's refund jurisdiction exists only as to licenses or taxes paid within those time limits, there could not have been any basis for granting any relief to the petitioners.

In discussing these time limitations, the Supreme Court of Pennsylvania said, in *Box Office Pictures, Inc. v. Board of Finance and Revenue*, supra (402 Pa. 511, 516, 166 A. 2d 656):

> "'* * * These requirements were not merely procedural provisions, but express conditions of the right to obtain a refund, failure to comply with which operated as an absolute bar to the right itself.'"

If it be assumed that the arguments presented in the previous subdivision of this brief were invalid, e.g., that the fees were not paid under duress or compulsion, or that the Act of 1915 was not void from the beginning, the period of limitations established by the Pennsylvania Legislature would still be effective and appropriate. This was also discussed by the Supreme Court of Pennsylvania in the *Box Office Pictures, Inc.*, case, supra, when it said:

> "* * * Assuming, arguendo, (1) that the Act of 1915 was void ab initio; (2) that the fees in question were paid under duress and compulsion; (3) that under common law, the Commonwealth could be sued for recovery; still, the legislature had the power and authority to prescribe the remedy to be pursued and to annex thereto reasonable conditions incident to the exercise of the right to sue: * * *"

The Court in the present case did not alter or overrule its decision in the *Box Office Pictures* case.

Petitioners rely upon the statement made by the Court in the instant case that no statutory authority is necessary to enable the recovery of amounts paid under duress and compulsion. However, the Court in the instant case also pointed out that when taxes were paid under duress and compulsion, the taxpayer could not recover them beyond six years after payment, citing *Swift Company v. United States*, supra (111 U.S. 22). Therefore, under even a common law form of action against the sovereign, a six-year period of limitations would apply, thus upholding the constitutionality of limitations in general.

This position is confirmed by a study of *Ward v. Love County*, 253 U.S. 17 (1920), cited in the Court in the instant case, and relied upon by petitioners. There a county in Oklahoma had collected taxes on allotments belonging to Indians in violation of exemptions protected by The Choctaw Treaty; the Act of Congress enabling Oklahoma to become a state; the Constitution of Oklahoma; and the Constitution of the United States; see Article II, Section 2, clause 2. There was undeniable duress, accompanied by protests, and this Court decided that the county must refund the taxes thus obtained.

Regarding the attempt of the county to rely upon the local statute of limitations, this Court said:

> "• • • This point was not discussed by the Supreme Court [of Oklahoma] and we are not concerned with it beyond observing that when the case is remanded it will be open to that court to

> deal with the point as to the whole claim or any item in it as any valid local law in force when the claim was filed may require." (253 U.S. 25).

After that decision, this Court denied certiorari in *Broadwell v. Bryan Co.*, 88 Okla. 147, 211 P. 1040 (1922), cert. den. 262 U.S. 750, where a two-year Oklahoma statute of limitations on filing a petition for refund of taxes paid by Indians from lands not subject to taxation was held to defeat a suit filed by an Indian beyond the two-year limitation. The plaintiff contended that since the state courts had held that he was not entitled to relief, his right of action did not accrue until this Court reversed the Oklahoma Court in *Choate v. Trapp*, 224 U.S. 665 (1912), followed by this Court in *Ward v. Love County*, supra (253 U.S. 17). Nevertheless, the court held that this cause of action accrued on the date the money was paid to the county in each instance, and concluded (211 P. 1042):

> "* * * We know of no rule, and no authority is cited to support the rule, that the statute of limitations does not run against a claim until a court of final resort has had adjudged a similar action could be successfully maintained."

See also *American Steel & Wire Co. of New Jersey v. State of Washington*, 49 Wash. 419, 302 P. 2d 207 (1956), which sustained a one-year limitation refund statute and distinguished *Ward v. Love County*, supra, and *Carpenter v. Shaw*, 280 U.S. 363 (1930), also relied upon by petitioners.

Under the Pennsylvania statutes and decisions, the Board of Finance and Revenue has no power to hear any case for refunds of payments made more than

five years prior to the filing of the petition. Therefore, any type of action available to petitioners, whether statutory or non-statutory, could not be heard by the Board, and its refusal to grant refunds beyond the five-year period should be affirmed.

III. Jurisdiction of This Court on Certiorari

The Pennsylvania Legislature, in permitting the Board of Finance and Revenue to grant refunds, provided that the action by the Board shall be "final". This means that there can be no appeal or writ of error from the decision of the Board, but only a review on narrow certiorari by the Supreme Court of Pennsylvania. Ordinarily, this review is limited to jurisdiction and regularity of proceedings, but the present case also includes a constitutional question, i.e., whether the five-year limitation was constitutional.

It is suggested that the certiorari available in this Court should likewise be limited to the question of constitutionality of the five-year limitation, and not embrace the many other facets of the case presented by the petitioners.

Otherwise, the petitioners will be achieving indirectly what they cannot do directly, i.e., bring a suit against the sovereign Commonwealth of Pennsylvania in this Court; see Article III, Section 2, and Eleventh Amendment, United States Constitution.

It has long been well settled that the sovereign immunity of a state prevented a suit to recover money in the general treasury and that a state could confine

to its own Courts suits against it to recover taxes: *Smith v. Reeves*, 176 U.S. 436 (1900); *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459 (1945).

At one time suits were permitted against a revenue officer to recover tax moneys illegally collected and still in his possession; see *Atchison, T. & S. F. Rwy. Co. v. O'Connor*, supra (223 U.S. 280), relied upon by the present petitioners. However, such a suit could not be maintained unless the State expressly consented to suits against it in the Federal Court; *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47 (1944). Subsequent decisions indicate that the rule which once permitted such suits to recover taxes from a segregated fund has been distinguished away; *Ford Motor Co. v. Department of Treasury of Indiana*, supra, (323 U.S. 459); *Kennecott Copper Corp. v. State Tax Commission*, 327 U.S. 573 (1946).

Accordingly, this Court should refuse the petition for certiorari in the present case, because the only justiciable issue is the constitutionality of a patently valid five-year period of limitations contained in the Pennsylvania refund statute.

Respectfully submitted,

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APPENDIX TO MOTION TO QUASH

Chronological Sequence of Petitions and Orders

UNIVERSAL FILM EXCHANGES, INC.

March 13, 1956, Decision in Hallmark Productions, Inc. v. Carroll, 384 Pa. 348 (1956).

October 8, 1958, Petition for Refund filed with Board of Finance and Revenue, Docket No. M-14534. No period or specific amount requested.

December 5, 1958, First Amended Petition for Refund filed with Board of Finance and Revenue. Petition incorporates paragraphs 1, 2, 3 and 4 of Petition for Refund and sets forth a certain time period (October 8, 1953 to March, 1956) and a sum certain ($49,108.91).

February 6, 1959, Amended Schedule "A" to First Amended Petition filed. This increased amount claimed to $49,844.00.

July 2, 1959, Board of Finance and Revenue granted refund in nature of a credit in amount of $49,844.00. Copy mailed July 8, 1959."

October 8, 1959, Second Amended Petition filed. Docket No. M-16585. Petition incorporated paragraphs 1, 2, 3 and 4 of original Petition for Refund. Requested refund for period May 15, 1915 to October 7, 1953 in amount of "$723,849.50 and upwards".

January 4, 1961, Decision in Box Office Pictures v. Board of Finance and Revenue, 402 Pa. 511 (1961).

May 25, 1961, Amended Second Amended Petition filed. Avers fees were paid "under duress and compulsion" and a denial of due process.

October 3, 1961, Order of Board of Finance and Revenue refusing the Petition. Copy mailed October 9, 1961.

October 24, 1961, Appeal taken to the Supreme Court.